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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554 FCC MAIL SECTION FCC 93M-643
40046

In re Application of)

RICHARD BOTT II)
(Assignor))

and)

WESTERN COMMUNICATIONS, INC.)
(Assignee))

For Assignment of Construction Permit)
of Station KCVI (FM), Blackfoot, Idaho)

MM DOCKET NO. 93-155

OCT 8 3 11 PM '93

File No. BAPH-920917G0

DISPATCHED BY

MEMORANDUM OPINION AND ORDER

Issued: October 6, 1993

; Released: October 8, 1993

1. Under consideration are: (a) a Motion to Delete Issues, filed July 6, 1993, by Richard Bott II ("Bott"); (b) an opposition to (a), filed on July 21, 1993, by the Mass Media Bureau ("Bureau"); (c) a reply to (b), filed on August 2, 1993, by Bott; (d) a Petition for Certification to Commission, filed on July 15, 1993, by Bott; and (e) an opposition to (d), filed on July 27, 1993, by the Bureau.

Background

2. By Hearing Designation Order and Notice of Opportunity for Hearing (Corrected), 8 FCC Rcd 4074 (1993) ("HDO"), the Commission designated this proceeding for hearing. The following issues were specified:

(a) To determine whether Richard P. Bott II has misrepresented facts to or lacked candor with the Commission, either in connection with his integration pledge presented in the course of the Blackfoot, Idaho comparative hearing proceeding, or in his opposition to the petition to deny filed in the instant proceeding.

(b) To determine, in light of the evidence adduced pursuant to issue (a), whether Richard P. Bott II is qualified to remain a Commission permittee.

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, whether the captioned application should be granted.

3. On June 25, 1993, Bott filed before the Commission a Petition for Leave to File Petition for Reconsideration, and an accompanying Petition for Reconsideration of the HDO. Therein, Bott argued that the designation of Issue (a) was premised upon an error of fact, and that Issue (a) should be deleted.

Bott further contended that the HDO was inconsistent with Eagle 22, Ltd., 7 FCC Rcd 5295 (1992). Bott also maintained that Issues (b) and (c) were moot since they flowed from Issue (a). Bott, therefore, requested that the Commission reconsider the HDO and grant the application for assignment of the construction permit for Station KCVI (FM).

4. On July 6, 1993, Bott filed before the Presiding Judge a Motion to Delete Issues. Therein, Bott requested the deletion of Issue (a) for the same reasons it urged upon the Commission for the deletion of that issue. On July 15, 1993, Bott filed before the Presiding Judge a Petition for Certification to Commission. Therein, Bott requested that the Presiding Judge certify to the Commission the question of whether the hearing in this proceeding should be held. Once again, Bott claimed that this case was designated for hearing on the basis of an error of fact, and that the HDO was inconsistent with Eagle 22. Bott argued that certification was appropriate in order to give the Commission the opportunity to review the HDO with a correct understanding of the critical facts and law.

5. By Order, FCC 93M-533, released August 17, 1993, the Presiding Judge deferred action on the Motion to Delete Issues and the Petition for Certification to Commission pending action by the Commission on the Petition for Leave to File Petition for Reconsideration and the Petition for Reconsideration. This ruling was made because the pleadings addressed to the Presiding Judge requested essentially the same relief as those addressed to the Commission. (See also Tr. 7-10.)

6. On August 18, 1993, Bott filed before the Commission a Request for Dismissal of "Petition for Leave to File Petition for Reconsideration" and "Petition for Reconsideration." Bott took this action, he stated, because of his desire to have the Presiding Judge rule on the pleadings pending before him. By Order, FCC 93-465, adopted October 1, 1993, the Commission, inter alia, granted Bott's Request for Dismissal, and dismissed his Petition for Leave to File Petition for Reconsideration and his Petition for Reconsideration. Consequently, action on Bott's Motion to Delete Issues and Petition for Certification to Commission may now be taken.

Motion to Delete Issues

7. In support of his Motion to Delete Issues, Bott contends that the factual premise for the Commission's specification of Issue (a) was erroneous. Specifically, Bott maintains that Issue (a) was designated on the basis of the following language in the HDO: "In response [to a petition to deny], Bott states that throughout the six-year effort to obtain his permit he maintained a good faith intention to both move to Blackfoot and operate KCVI as a commercial facility with a religious format." (HDO at para. 3; emphasis added.)¹ Bott claims, however, that he never stated in his response to the petition to deny

¹ See also paragraph 11 of the HDO where the Commission stated: "Bott has represented in the instant proceeding that, throughout the comparative proceeding, he always intended to operate with a commercial religious format" (Emphasis added.)

what the Commission attributed to him in the HDO. Therefore, Bott asserts, there was in fact no conflict between his hearing testimony² and his response to the petition to deny. Bott concludes from the above that Issue (a) should be deleted, that Issues (b) and (c) should be resolved (sometime in the future) by summary decision, and that the above-captioned assignment application should be granted. The Bureau opposed Bott's motion, and Bott filed a reply to the Bureau's opposition.

8. Bott's motion will be denied. In Atlantic Broadcasting Company, 5 FCC 2d 717, 721 (1966), the Commission directed subordinate officials, such as the Presiding Judge, in circumstances such as those presented here, to:

look to see whether specific reasons are stated for our action or inaction in a designation order, rather than merely considering whether ... we were aware of the general matter upon which [the petitioner] relies. If our designation order contains a reasoned analysis of a particular matter, we are confident that, in the absence of additional information on the subject previously unknown to us, the subordinate officials will have no difficulty in adopting that analysis and denying the relief requested.

9. Contrary to Bott's contention,³ the HDO in this proceeding does contain a "reasoned analysis" and explanation of the rationale behind the Commission's specification of Issue (a). While Bott strongly disagrees with that analysis and argues that it is erroneous, that does not undermine or change the fact that such an analysis is present. Under these circumstances, Atlantic precludes the Presiding Judge from substituting his judgment for that of the Commission, and the deletion of Issue (a) would not, therefore, be appropriate.

10. Moreover, even assuming, arguendo, that the HDO contained no "reasoned analysis," the deletion of Issue (a) would still not be warranted. Such an action would have the effect of second-guessing or reversing the Commission's determination to designate this case for hearing, and would ultimately result in the termination of this proceeding. However, it is well established that the Presiding Judge lacks the authority to review the propriety of the designation of a case for hearing, or to issue a ruling which would have the effect of dismissing a hearing designation order as defective. See Frank H. Yemm, 39 RR 2d 1657, 1658-59 (1977); see also Anax Broadcasting Inc., 87 FCC 2d 483, 486 (1981).

² During his testimony in the comparative hearing for the Blackfoot facility, Bott denied that he intended to operate with a religious-oriented format, and stated that he had not as yet chosen the format of his proposed station. (HDO at para. 9.)

³ Reply to Opposition at paras. 2-3.

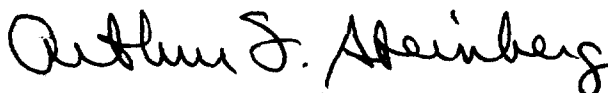
Petition for Certification to Commission

11. Bott requests that the Presiding Judge certify to the Commission "the question of whether, based upon policy in effect at the time of designation (and to this date) and undisputed facts, a hearing should be held."⁴ In support, Bott again contends, for the reasons recited above, that the underlying predicate of the HDO was fallacious. In addition, Bott claims that paragraphs 11 and 12 of the HDO are in conflict with Eagle 22 to the extent that Bott's business judgment and rationale for assigning the construction permit for Station KCVI are questioned. Bott maintains that the Commission in Eagle 22 rejected this as an area of inquiry in assignment cases. Since the HDO was adopted based upon a mistake of fact and is inconsistent with Eagle 22, Bott argues that the Commission should be given the opportunity on certification to consider this proceeding with a correct understanding of the facts and law. The Bureau opposed Bott's petition for certification.

12. Bott's petition will be denied. As a practical matter, Bott's petition for certification is an attempt, through the authority of the Presiding Judge, to have the Commission review and reconsider the HDO in this proceeding. However, Bott had pending before the Commission itself a Petition for Leave to File Petition for Reconsideration and an accompanying Petition for Reconsideration of the HDO. Those pleadings raised directly before the Commission the identical questions that Bott is now seeking to have the Presiding Judge certify to the Commission. Despite this, Bott voluntarily chose to dismiss his Petition for Leave to File and his Petition for Reconsideration without awaiting Commission action on the merits of his arguments. In other words, Bott willfully and purposely withdrew from the Commission the opportunity to review and reconsider the HDO in light of his contentions. Yet, at the same time, Bott is maintaining that the Presiding Judge should give the Commission the opportunity to do the same. These positions appear to be completely inconsistent and, given the circumstances, it would not be appropriate to allow Bott to accomplish through indirect means that which he no longer desires or is willing to attempt to do by direct means. Consequently, his petition for certification must be denied.

Accordingly, IT IS ORDERED that the Motion to Delete Issues filed by Bott on July 6, 1993, and the Petition for Certification to Commission filed by Bott on July 15, 1993, ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Arthur I. Steinberg
Administrative Law Judge

⁴ Petition for Certification at 1.